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No. 06-562

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

-v.-

ATLANTIC RESEARCH CORPORATION,
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The City of New York ("City") voluntarily investigates and remediates contamination caused by third-parties in order to protect its citizens and the environment as well as to revitalize brownfield properties. The main question the City addresses is whether the City, in all circumstances, is entitled to recover its voluntarily incurred response costs from responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act.

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae the City of New York ("City") submits this brief in support of respondent Atlantic Research Corporation seeking affirmance of the United States Court of Appeals for the Eighth Circuit's decision in *Atlantic Research v. United States*, 459 F.3d 827 (8th Cir. 2006).[1]

The City, a political subdivision of the State of New York, is actively involved in the investigation and remediation of contaminated properties throughout its five boroughs. While the City conducts some of these activities pursuant to consent orders with the State of New York and less often, with the United States, the City also conducts voluntary cleanups of properties contaminated by third-parties. The City's motivation in remediating this contamination is twofold. First, the City is committed to abating hazardous contamination that poses a threat to its citizens and the environment. Second, the City remediates brownfields in order to foster economic growth by returning these underutilized properties to productive uses. The private causes of action available under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, are critical to both of these goals.

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[1] Pursuant to Rule 37.6 of this Court, the City represents that counsel for the City authored this brief in its entirety and that no person or entity other than the City or its representatives made any monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent are submitted to the clerk's office with this brief.

With respect to the City's first goal, the City uses CERCLA to recover costs associated with remediating contamination that threatens human health or the environment and is caused by a third-party. For example, in 1997, a City contractor was performing routine work at a rail facility that the City has owned since the 1970s and leases to private entities. In the course of performing this work, the contractor discovered over a dozen buried drums of chlordane, a pesticide that has been banned by the United States Environmental Protection Agency (EPA), as well as extensive polyaromatic hydrocarbon (PAH) contamination in soils on the site. Both of these compounds pose a risk to human health and the environment.

In accordance with State regulatory requirements, the City notified the New York State Department of Environmental Conservation (NYSDEC) of the situation and its plans to abate the contamination. NYSDEC agreed with the City's planned course of remedial action, but did not order the City to conduct a cleanup or directly supervise it. The City voluntarily conducted the investigation and remediation of the buried hazardous waste with its own funds.

The City then brought a CERCLA claim in the Eastern District of New York against the corporation that leased the land from the City as well as against its chief executive officer. As further explained in the district court's decision on the City's motion for summary judgment, the City had facts supporting its claim that the drums of chlordane had been surreptitiously buried by the tenant on the City's property. See *City of N.Y. v. N.Y. Cross Harbor R.R. Terminal Corp.*, Case No. 98-7227, 2006 U.S. Dist. LEXIS 4238 (E.D.N.Y. 2006). The City

was eventually able to recover a substantial sum of its response costs through settlements with the defendants.

A second example where the City voluntarily incurred response costs in order to abate a serious threat to its environment and then brought a CERCLA claim to recover its costs is *City of New York v. Chemical Waste Disposal Corp.*, 836 F. Supp. 968 (E.D.N.Y. 1993). The defendants in that case were found to be pumping large quantities of hazardous chemicals through a floor drain and into the City's sewer system. The City incurred substantial costs voluntarily abating this illegal and dangerous activity fourteen months before EPA brought its own claim against the defendant.

These two cases exemplify how voluntary response actions, coupled with attendant private cost recovery claims, can be used to effectuate environmental remediation and responsible party liability, two of CERCLA's main goals. However, in both of these cases, the City may have qualified as a potentially responsible party (PRP) and thus would likely be unable to bring similar claims in the future if the petitioner's argument is accepted. Thus, the City is an *amicus* in this proceeding because it has an interest in ensuring that it can continue to bring litigation that benefits its citizens and its environment.

In addition to helping the City protect its environment, CERCLA claims can also play an important role in improving the City's economy. New York City, like many municipalities throughout the country, is burdened by a large number of brownfield properties. CERCLA defines a brownfield as real property "the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous

substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A). Brownfields are synonymous with urban blight, producing little tax revenue and few jobs, if any. Brownfield redevelopment increases the local tax base, facilitates job growth, utilizes existing infrastructure, takes development pressures off of undeveloped land, and improves and protects the environment. EPA estimates that there are currently 450,000 brownfields in the United States and actively promotes the cleanup and reinvestment in these properties.

In New York City, brownfield properties are often clustered together in historically lower income neighborhoods or in former manufacturing districts along the City's waterfront. The economic viability of these manufacturing districts – which were once the backbone of the City's economy – has dramatically declined in recent years, as evidenced by a fifty percent reduction in the number of manufacturing jobs in the City since the early 1960s. In addition, many lands along the City's waterfront were created in the nineteenth and early twentieth by filling wetlands with contaminated construction and demolition debris, incinerator ash, and other byproducts of an industrialized society. This so-called "historic fill material" is ubiquitous throughout certain areas of the City and is prohibitively expensive to remove and dispose of properly.

The potential environmental conditions at these properties ward off prospective developers, who fear expensive remediation costs and the possibility of an enforcement action by state or federal authorities. The City has a broad strategy to revitalize these properties including, but not limited to, applying for federal and state funding, providing information and assistance to community and business groups working on brownfields redevelopment,

and, perhaps most importantly, voluntarily investigating and remediating brownfield sites.

A good example of the City's work in this area is its ongoing investigation and remediation of an approximately 200-acre tract of land on the Hunts Point Peninsula, which is located in the borough of the Bronx. Between the 1920s and 1950s, the Consolidated Edison Company of New York (Con Edison) used a significant portion of this land for a manufactured gas plant (MGP) operation. MGPs were facilities that existed throughout the country during most of the nineteenth and twentieth centuries. These facilities produced natural gas for use in home heating and lighting by gasifying coal, oil, and other feedstocks. See generally New York State Department of Environmental Conservation, *The MGP Program at the NYSDEC* (April 2007) <http://www.dec.state.ny.us/website/der/mgp/dec_mgp.html>.

The MGP process created two distinct types of hazardous wastes: coal tar, which is an oily liquid with high levels of PAH compounds, and purifier waste, which contains cyanide. *Id.* In the era before environmental regulation, many MGP plant operators would directly dispose of this material on the grounds of the plant. The NYSDEC estimates that there are roughly 300 former MGP sites in New York state alone, with several dozen in New York City. *Id.* Because many of these MGPs ceased operations decades ago, these sites are often hidden and have unwittingly been developed over the years into a range of industrial, commercial, and even residential uses. *Id.*

The City purchased the site of the former Hunts Point MGP in the late 1960s and early 1970s and, while the City was able to develop some of the property for

commercial and industrial purposes, dozens of acres at the site sat idle for decades due to economics and, ultimately, its potential environmental conditions. In the late 1990s, the City began carrying out a comprehensive plan to revitalize the idle acreage at Hunts Point by entering into several separate voluntary cleanup agreements (VCAs) for the site with the NYSDEC.

Con Edison, the PRP, was not a party to the VCAs; however, via a companion agreement, Con Edison reimbursed the City for some of the investigative and remedial costs associated with the MGP waste. This agreement was prompted, at least in part, by the prospect of the City bringing a cost recovery action against Con Edison under CERCLA. Thus, even though a lawsuit was not filed, the threat of a private party CERCLA cost recovery action prompted a former owner and operator to offer the funding that led to the successful redevelopment of this large brownfield site. In 2005, the historic Fulton Fish Market was moved from lower Manhattan into a state-of-the-art new facility at the site of the former MGP, bringing 600 jobs and a one billion dollar industry to the Bronx. This positive turnaround may not have occurred had the City not voluntarily remediated the 28,000 tons of coal tar and 8,000 tons of purifier waste fouling the site. This accomplishment was recognized in 2006 when the project was awarded the Phoenix Award for Excellence in Brownfields Redevelopment for EPA Region 2.

While the City's accomplishments are noteworthy, a staggering amount of work remains to be done, both in abating threats to the environment and revitalizing brownfields. It is currently estimated that there are approximately 5,700 acres of contaminated land in New York City. The City's need to remediate these properties is made more urgent by the fact that the City's population is

projected to grow by another 1 million people by 2030, thus increasing the need for livable and usable space. If the City is no longer permitted to recover its voluntarily incurred response costs from responsible parties under CERCLA, addressing these issues will be made substantially more difficult and expensive. Therefore, the City has a strong interest in arguing for this Court to uphold the right of all parties, whether they be innocent or potentially responsible, to recover their response costs under Section 107(a)(4)(B) of CERCLA.

SUMMARY OF ARGUMENT

Since 1980, CERCLA has unalterably stated that responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan" and "any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . ." 42 U.S.C. 9607(a)(1)-(4)(A)(B). This broad net of both public and private liability promotes CERCLA's twin goals of "encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for response costs that their past activities induced." See *Metropolitan Water Reclamation Dist. v. North Am. Galvanizing & Coatings*, 473 F.3d 824, 836 (7th Cir. 2007). With respect to private cost recovery claims, this Court recognized over a decade ago that Section 107 "unquestionably provides a cause of action for private parties to seek recovery of cleanup costs." See *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 (1994).

In *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 165-68 (2004), this Court clarified that suits for contribution brought under Section 113(f)(1) of

CERCLA are only available to persons that have first been sued under either Section 106 or Section 107. Since the Court's decision, three courts of appeal have held that the language and intent of CERCLA clearly allow any person, including PRPs, to bring cost recovery claims under Section 107(a)(4)(B). See *Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 99-100 (2d Cir. 2005); *Atlantic Research*, 459 F.3d at 834-35 (8th Cir. 2006); *Metropolitan Water Dist.*, 473 F.3d at 834-36; see also *Schaeffer v. Town of Victor*, 457 F.3d 188, 199-201 (2d Cir. 2006) (separate three-judge panel of the Second Circuit reaffirming the holding and analysis set forth in *Consolidated Edison of New York*). Only one court of appeals has since ruled that Section 107(a)(4)(B) actions are only available to innocent parties and that PRPs who voluntarily incur response costs have no remedy under CERCLA. See *E.I. Dupont De Nemours & Co. v. United States*, 460 F.3d 515, 530 (3d Cir. 2006). The interpretation given CERCLA by the United States Courts of Appeals for the Second, Seventh, and Eighth Circuits is the correct one, and should be affirmed by this Court.

These courts of appeals all recognized the importance of voluntary remedial actions and private cost recovery claims as an essential part of the CERCLA statutory framework. The petitioner's arguments to the contrary are not only disconnected from CERCLA's language and purpose, but also fail to consider *who* these so-called PRPs are, and *how important* voluntary cleanups are to remediating this country's contaminated land.

ARGUMENT

I

SECTION 107(a)(4)(B) OF CERCLA CREATES A PRIVATE COST RECOVERY CLAIM FOR ANY PERSON WHO INCURS RESPONSE COSTS

Petitioner's position that CERCLA does not allow PRPs to bring Section 107(a)(4)(B) claims is based upon several misinterpretations of the statute, a number of which are addressed below.

A. 107(a)(4)(B) is a Distinct Cause of Action from 113(f)(1)

Petitioner contends that PRPs are only permitted to bring contribution actions under Section 113(f) regardless of whether or not they voluntarily incurred response costs at a site. However, as this Court noted in *Cooper Industries*, the causes of action under 107(a)(4)(B) and 113(f) are "clearly distinct," and available to plaintiffs who have incurred different types of harm. 543 U.S. at 163 n. 3; see also *Consolidated Edison of New York*, 423 F.3d at 99 (stating that Sections 107(a) and 113(f)(1) embody mechanisms for "cost recovery available to persons in different procedural circumstances").

As recognized by the Eighth Circuit, Section 107(a) claims are available to any plaintiff who actually incurs response costs at a site, i.e., voluntarily expends money investigating and remediating a site contaminated by hazardous waste without being prompted by a Section 106 or 107 enforcement action by the state or federal

government. See *Atlantic Research*, 459 F.3d at 835. In contrast, plaintiffs who have been the subject of a 106 or 107 actions are only eligible to pursue contribution actions under Section 113(f). *Id.*

This interpretation of CERCLA is straightforward as it rightly distinguishes between parties who act voluntarily and those who do not. Parties who voluntary take on cleanup responsibilities incur substantial, upfront risks by investigating and remediating contamination at a site before the extent of the contamination is fully delineated. In contrast, parties who are subject to an enforcement action take on no such risk, and in many instances, are merely paying money while someone else is doing the actual work. As analogized by the Court of Appeals for the Second Circuit, if a "party expends funds out of obligation under an administrative or court order or final judgment, its liability may be similar to that of a tort feasor's liability for the doctor's bills of the injured party. Payment by the tort feasor does not mean it has incurred doctor's bills itself." See *Consolidated Edison of New York*, 423 F.3d at 101 (internal citations omitted); see also *United States v. Taylor*, 909 F. Supp. 355, 365 (M.D.N.C. 1995) (stating when a party "does not conduct its own cleanup, it has not incurred recovery costs").

Thus, any party who has incurred actual response costs at a site – as opposed to costs incurred as a result of litigation – should be entitled to cost recovery under Section 107(a)(4)(B).

B. Interpretation of the Phrase "Any Other Person"

Petitioner's claim that the use of the phrase "any other person" in Section 107(a)(4)(B) was intentionally used by Congress to restrict private cost recovery claims to

innocent parties, is refuted by the Eighth Circuit's more logical interpretation that "'any other person' means any person other than the statutorily enumerated United States Government or a State or an Indian Tribe." See *Atlantic Research*, 459 F.3d at 835. The Eighth Circuit's position is firmly supported by a plain reading Section 107(a)(4)(A) and (B) and an analysis of CERCLA's definition of the word "person." See 42 U.S.C. § 9601(21).

CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, *United States Government, State*, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 9601(21) (emphasis added). Given that the definition of person includes both the United States and the States, if Section 107(a)(4)(B) did not use the word "other" to qualify the word "person," CERCLA would provide two separate avenues for the United States and the States to bring cost recovery actions: Section 107(a)(1)(A) – in which they are specifically mentioned – and 107(a)(4)(B) – in which they are included only by virtue of the statutory definition of "person." Such a result would be illogical as Congress intended the two causes of action to have different burdens of proof. See *Carson Harbor Village, Ltd. V. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006); *United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161, 178 (3d. Cir. 2005).

Thus, it is likely that, when adding the word "other," the authors of CERCLA merely recognized the definitional overlap caused by the use of the word "person" in Section 107(a)(4)(B) and decided to provide a simple clarification. However, as petitioner admits, "the legislative history does not shed light on that particular change." Petitioner's Brief on the Merits (Pet. Brief), at 19.

The lack of legislative history surrounding this change supports the interpretation that this change was intended to be minor, and not, as petitioner contends, an exclusion of an entire class of private CERCLA plaintiffs from the ability to bring a cost recovery action. See, e.g., *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986) (finding no basis for granting the "ordinary word [other]" a critical meaning in interpreting CERCLA 107(a)(4)(B) when it has "an alternate, more plausible purpose"). Thus, the interpretation of the phrase "any other person" by the Eighth Circuit should be upheld.

C. Private Cost Recovery Claims Brought by PRPs Will Not Create A Disincentive to CERCLA Settlements

Petitioner warns that allowing private cost recovery actions by PRPs under Section 107(a)(4)(B) will discourage settlements with the state and federal government and thus interfere with a key objective of CERCLA. It is without question that an objective of CERCLA and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, was to encourage PRPs to quickly enter into settlement agreements with the United States and the states in order to avoid protracted litigation. See *United Technologies v. Browning-Ferris*, 33 F.3d 96, 102 (1st Cir. 1994). To promote this goal, CERCLA offers settling PRPs with contribution protection "for claims for contribution regarding matters addressed in the settlement [of a 106 or 107 claim]." *See* 42 U.S.C. 9613(f)(2). Section 113(f)(2) also implicitly threatens parties with the prospect of disproportionate liability if they do not enter into a settlement agreement. Petitioner's argument, however, that 107(a)(4)(B) claims brought by PRPs will impede the

statute's promotion of settlements, is legally flawed and premised on unrealistic, hypothetical situations.

First, it is wrong for the petitioner to assert that 107(4)(B) claims brought by PRPs will uniquely interfere with the contribution protections offered by Section 113(f)(2). A settling party is equally threatened by post-settlement cost recovery claims brought by innocent parties because Section 113(f)(2) offers no protection from these claims either. See 42 U.S.C. 9613(f) (offering liability protection "for claims for contribution regarding matters addressed in the settlement").

To illustrate, a common issue at inactive hazardous waste sites is offsite migration of onsite contamination via the groundwater or other media. These migrating contaminates have the potential to contaminate the soil and groundwater of adjacent properties owned by individuals who have nothing to do with the activities on the inactive hazardous waste site. As the petitioner admits, these innocent landowners have the right to recover any response costs under Section 107(a)(4)(B). See Pet. Brief. 16.

Thus, if a PRP enters into a settlement with the United States or a state with regard to onsite contamination, they still face the prospect of liability from cost recovery claims brought by these innocent third-parties. Similarly, under certain circumstances, they could face similar claims from subsequent purchasers of the property. *See* Pet. Brief, at 16. Thus, the threat of post-settlement liability and a lack of full contribution protection will not be eliminated by preventing PRPs from recovering their response costs under Section 107(a)(4)(B).

Second, petitioner's argument that PRPs will forego settlement with the United States or a state in order to take advantage of the joint and several liability offered by a

Section 107(a) claim is flawed because it would be unusual, if not impossible, for one PRP to actually obtain joint and several liability against another. See Pet. Brief at 37. As the Second Circuit has made clear in *Consolidated Edison of New York* "a person sued under Section 107(a) . . . [may bring] a counterclaim under Section 113(f)(1) for offsetting contribution against the plaintiff volunteer who, if sued, would be liable under Section 107(a)." See *Consolidated Edison of New York*, 423 F.3d at 100, n. 9. This right of contribution is available whether or not the United States or a State has brought an enforcement action. See 42 U.S.C. § 9613(f)(1) (stating that "nothing in this subsection shall diminish the right of any person to bring an action for contribution the absence of a civil action under 9606 or 9607 of this title.")

While petitioner complains that this framework shifts the burden onto the defendant PRP for bringing a counterclaim to avoid joint and several liability, the burden is minimal and not any more burdensome than having to assert contributory negligence to avoid joint and several liability in a negligence claim. This minimal burden is further reduced by the fact that 113(f) counterclaims are not compulsory. See *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 748 (7th Cir. 1993) ("The statute is explicit that a counterclaim for response costs is not compulsory . . . a result consistent with general law"). Thus, given that the chance of obtaining joint and several liability against another PRP is slim to nil, it is unlikely that a PRP would choose to bring a 107(a)(4)(B) action over obtaining the liability release and contribution protection offered by a settlement with the United States or a state.

Finally, CERCLA's goal of encouraging prompt settlements with the United States or the states only comes into play when these entities are actively enforcing against

the PRPs at the site. As recognized by the Seventh Circuit in *Metropolitan Water District*, the petitioner's concerns regarding "diminished settlement leverage" do not exist when the United States or the states "are not in the picture" and thus have "no reason to pursue a settlement." See *Metropolitan Water Dist.*, 473 F.3d at 837. As evidenced by the City's experiences in conducting voluntarily cleanups as discussed above, it is often the case that once a PRP takes the lead in conducting a response action, there is no need for the EPA or a state regulatory agency to bring an enforcement action against the self-motivated PRP.

In the *Cross Harbor* case, for instance, the City notified the NYSDEC of its plan and then spent its own resources investigating and remediating the hazards on its property. In such circumstance it would be illogical, and a great waste of governmental resources, to do as the petitioner suggests and "enter into a settlement with the federal or state government." Pet. Brief, at 43. Such a statement wrongly assumes that the individual states and federal government have the desire or the resources to bring CERCLA actions in every instance of hazardous contamination that occurs in this country, even when another entity is ready and willing to conduct the cleanup. Moreover, if the states or federal government decline to take action, a PRP has no recompense for his voluntary action due to the lack of involvement of a federal or state enforcer.

Additionally, where the states and federal government are absent in a cleanup, CERCLA's goal of achieving prompt settlements can still be carried out by private parties. Almost all of the CERCLA actions that the City has brought or planned have resulted in some form of settlement with the other PRPs. Most notably, in *City of New York v. Cross Harbor*, the City was able to obtain a

settlement with several defendants for hazardous waste response costs that it incurred at its rail facility. Similarly, at the Hunts Point site, the City was able to use CERCLA as a key negotiating point with the PRP in order to achieve an agreement. These examples of agreements or settlements arising out of private cost recovery actions debunk the hypothetical concerns offered by the petitioner in support of its argument.

II

LIMITING COST RECOVERY CLAIMS TO NON-PRPS WILL EXCLUDE FAULTLESS PRPS FROM BRINGING COST RECOVERY ACTIONS

Because this case centers around the right of PRPs to bring claims under Section 107(a)(4)(B) of CERCLA, it is important for this Court to consider *who* can qualify as a PRP under CERCLA and how broadly that term has been interpreted over the years by federal courts. It is also important for this Court to consider whether the language of section 107(a)(4)(B) supports petitioner's contention that bona fide purchasers or other parties who qualify for CERCLA defenses may bring cost recovery claims while PRPs cannot.

A. The Broad Scope of PRP Status

In general, CERCLA sets out four categories of persons who are liable for response costs: (i) current owners and operators; (ii) past owners and operators who owned or operated the facility at the time of the disposal of hazardous substance; (iii) persons who arrange for hazardous substance to be disposed of at the facility where

there is a release; and (iv) persons who transport hazardous substances to a facility where there is a release. See 42 U.S.C. 9607(a)(1)-(4). Congress intentionally crafted these categories of covered persons to be broad and the federal courts have broadened them even further by interpreting CERCLA as requiring no finding of causation or fault. See *Farmland Industries, Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1339 (8th Cir. 1993); *United States v. Alcan Corp.*, 990 F.2d 711, 721 (2d Cir. 1993); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

Over the years, federal courts have interpreted CERCLA's provisions as granting PRP status to individuals who did not directly cause or participate in the original release or disposal of contamination at the site. See, e.g., *Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 675-80 (4th Cir. 1995) (holding that a municipal operator of a sewer system is liable for the acts of a third-party that discharges hazardous waste into the system); *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 689-90 (9th Cir. 2004) (holding that non-polluting landowner of a contaminated site is a PRP under CERCLA); *Redwing Carriers v. Saraland Apts.*, 94 F.3d 1489, 1512 (11th Cir. 1996) (holding that operator liability can occur when a party disperses contaminated soil during the course of grading and filling a construction site); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573-74 (5th Cir. 1988) (holding that developers who graded and improved contaminated property could be subject to both operator and arranger liability); and *Elementis Chems., Inc. v. T H Agric. & Nutrition*, L.L.C., 373 F. Supp. 2d 257, 268-69 (S.D.N.Y. 2005) (holding that current owner who undertakes response action is a PRP regardless of whether the owner causes the release). These cases and others show that CERCLA

liability has been held to attach to innocent and unassuming entities who engage in normal activities such as readying what turns out to be contaminated site for development or even operating a municipal sewer system.

That these non-polluting PRPs can be held liable under CERCLA for their involvement with the contaminated site is not necessarily inconsistent with the statute's language or intent. What is inconsistent, however, is petitioner's argument that, by virtue of their legal status as PRPs, these otherwise innocent parties are barred from recovering their response costs from the individuals who actually caused the contamination. The petitioner's interpretation that PRP status bars an action under 107(a)(4)(B) would result in inequities to these non-polluting PRPs, especially in urban areas where environmental conditions often remain concealed long after the contaminating activities on the site have ceased.

A telling example of how PRP status is too easily achieved under CERCLA in urban areas is evidenced by the continued finding of new MGP contamination throughout New York City and State. Although the NYSDEC has been aggressively attempting to identify new MGP sites for years now, it is still working to identify how many other sites may exist in New York, and where they are located. At least three times in the past ten years, the City has uncovered previously unknown MGP contamination on properties it owned well before the enactment of CERCLA. For at least one of these sites, nothing in the property records even indicated that MGP contamination was present on the site.

Yet on all of the sites, the City (or other private owners) could be considered a PRP merely because it is the owner at the time the previously hidden contamination is

identified. Moreover, MGP contamination is only one example of hidden environmental conditions that may be discovered in the course of a City development project. To bar the City from bringing cost recovery actions against prior owners, operators, arrangers, and transporters, merely because the City owns or has used the land where the contamination is found, would expose the City and other similarly situated municipalities to extensive liabilities.

These potential liabilities would have a chilling effect on developing properties that may be contaminated because any developer, either the City or a private entity, would have no federal claim to offset the oftentimes extensive investigation and remedial costs unless, in each instance, the United States or the state brings an enforcement action. As recognized by the Second Circuit in *Consolidated Edison of New York*, "[w]ere this economic disincentive in place, such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit." 423 F.3d at 100. This chilling effect is directly contrary to CERCLA's intent of encouraging parties to remediate contaminated properties.

B. Nothing In Section 107(a) Creates A Distinction Between Innocent Landowners or Bona Fide Purchasers and PRPs

Although the petitioner claims that PRPs as enumerated under Section 107(a)(1)-(4) have no right to bring a claim under Section 107(a)(4)(B), petitioner does claim that certain types of landowners who might otherwise meet the definition of a PRP should still be allowed to bring Section 107(a)(4)(B) claims if they can qualify as either an "innocent landowner" or a "bona fide purchaser"

under the statute. Petitioner's attempt to create a distinction that some, but not other, PRPs can bring claims under the Section 107(a)(4)(B) is not supported by the statutory text.

The "innocent landowner" and "bona fide purchaser" provisions of CERCLA cited by the petitioner are clearly intended to be affirmative defenses against 107(a) claims, not elements of the claims themselves. See 42 U.S.C. 9601(35), 9601(40), 9607(b) and 9607(r)(1). Nothing in the statutory text indicates that these provisions are intended to be used as methods by which PRPs can establish standing to bring a claim under 107(a)(4)(B). Indeed, while it is true that certain courts of appeal have read these sections consistent with the petitioner's view, see, e.g., *Western Props. Serv. Corp*, 358 F.3d at 690 n. 53, the language of these sections is expressly used in terms of establishing affirmative defenses. For example, Section 107(b) is expressly entitled "Defenses," and Section 107(r)(1) states that a bona fide purchaser shall "not be held liable as long as [he] does not impede the performance of a response action or natural resource restoration." See 42 U.S.C. 9607(b) and 9607(r)(1). Thus, while the petitioner criticizes the Eighth Circuit of judicially inferring a new cause of action for PRPs who incur response costs, petitioner is proposing that this Court recognize distinctions that plainly do not exist in Section 107(a)(4)(B).

Furthermore, accepting petitioner's argument would require courts to make detailed factual determinations whether a plaintiff meets the detailed standards for an "innocent landowner" and "bona fide purchaser," an evaluation that Section 107(a)(4)(B) does not envision. It is also likely that, at least in some cases, the threshold issue of whether the plaintiff is a PRP will not be decided until the case moves forward to trial. This would result in great

judicial inefficiencies as many CERCLA cases often take at least several years to reach that point.

This unwieldy framework that would have parties argue whether a plaintiff is a PRP as a threshold issue will further complicate the already muddied world of CERCLA litigation. The statute does not require it and it thus should be rejected. Instead, a far more clear and workable solution would be to interpret the statute as it is written: allowing any person who has incurred response costs to bring a Section 107(a) cost recovery claim.

III

VOLUNTARY RESPONSE ACTIONS ARE CRITICAL TO STATE AND FEDERAL EFFORTS TO ADDRESS HAZARDOUS CONTAMINATION

The petitioner contends that CERCLA was not intended to foster voluntary remediation of sites but instead intended to encourage "negotiated settlements leading to supervised cleanups." Pet. Brief, at 41. Petitioner's argument fails to acknowledge, however, that over the past fifteen years the federal and state governments have moved significantly away from administrative settlements for moderately contaminated sites and instead have actively encouraged parties to voluntarily remediate the contamination. The substantial gains made by these voluntary remedial programs could be lost if volunteers are now forced to endure the financial burden they believed would be offset by their ability to bring CERCLA claims.

In the late 1980s, limited state and federal resources, coupled with trepidation in the private sector for taking on expensive cleanup obligations, led to a hindrance

of cleanups at brownfields and other contaminated sites. See United States General Accounting Office, *Brownfield Development: Stakeholders Report that EPA's Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts*, GAO-05-94, at 10 (December 2004). In response, "some states began to establish voluntary cleanup programs that allow private parties to identify and clean up sites, use less extensive administrative procedures, and obtain some relief for future state liability for past contamination." *Id.* The programs also proved beneficial to the federal and state governments because encouraging voluntary cleanups by PRPs allowed EPA and state enforcement agencies to focus their limited resources on the most seriously contaminated sites. See United States General Accounting Office, *State Voluntary Cleanup Programs Provide Incentives to Encourage Cleanups*, GAO/RCED-97-66, at 14 (April 1997).

In 1995, EPA began authorizing states to use federal funds to develop voluntary cleanup programs. *Id.* In November 1996, EPA's Office of Solid Waste and Emergency Response issued a guidance document entitled "Interim Approaches for Regional Relations with State Voluntary Cleanup Programs." See Memorandum from Elliot Laws, Assistant Administrator, Office of Solid Waste and Emergency Response, and Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance (Nov. 14, 1996) <http://www.epa.gov/brownfields/html-doc/vcp.htm>. In the guidance, which is still in effect today, EPA set out baseline criteria which it employs to evaluate the adequacy of state voluntary cleanup programs. EPA memorializes its acceptance of the state voluntary cleanup program by entering into a Memorandum of Agreement ("MOA") with a state. In return, EPA provides a non-binding promise to avoid taking any enforcement action under 106 and 107 of

CERCLA at sites undergoing a state supervised voluntary cleanup. Since 1996, EPA has entered into MOA's with twenty-three individual states in order to promote their use of voluntary cleanup programs. See Memorandum of Agreement on State Voluntary Cleanup Programs (Mar. 27, 2007) <http://www.epa.gov/brownfields/html-doc/statemoa.htm>.

The federal government's promotion of voluntary cleanup programs became even stronger in 2002 when Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, Pub L. 107-118, 115 Stat. 2356, which, among other things, increased federal funding for these programs and formally dissuaded EPA from taking CERCLA enforcement action at "eligible response sites" that are enrolled in a state program that meets certain criteria. *See* 42 U.S.C. 9601(41)(B)(ii). In large part because of EPA's efforts to promote these programs, all fifty states have some version of a voluntary cleanup program available to both PRPs and non-PRPs.

New York State began its voluntary cleanup program in 1994 and has accepted 762 sites into the program. See New York State Department of Environmental Conservation, *Annual Remedial Programs Report for State Fiscal Year 2005-06*, at 7 (2006) <http://www.dec.state.ny.us/website/der/2006annualreport.pdf>. New York State's voluntary program was such a success that the New York State Legislature codified the program in 2003 and bolstered it by offering innocent and PRP remedial parties tax incentives for voluntarily remediating sites. See generally N.Y. Environmental Conservation Law § 27-1401 *et seq.* (McKinney 2006). The codification of the voluntary program in New York State is indicative of the decided national trend of moving

away from enforcement-based cleanups and expanding voluntary remedial programs.

The City has taken advantage of New York State's voluntary cleanup program to address contamination at a number of complicated sites, most notably the Hunts Point Peninsula in the Bronx. The City has entered into several voluntary cleanup agreements to address various parcels at the 200-acre site. The voluntary cleanup program has offered the City the regulatory flexibility and limited state oversight necessary to complete such an extensive investigation and remediation in a timely and efficient manner. Furthermore, other large public entities such as Con Edison have used New York State's voluntary cleanup program to address MGP contamination at various sites throughout the state. See *Consolidated Edison of New York*, 423 F.3d at 93 (describing Con Edison's use of voluntary cleanup program to investigate and remediate former MGP sites).

In its brief, the petitioner argues that CERCLA was not intended to promote "wholly voluntary, unsupervised, *sua sponte* cleanup" operations but instead encourages PRPs to enter into settlement agreements or consent decrees to resolve their liability at a site. Pet. Brief, at 41-43. The petitioner asserts that PRPs entering into such agreements with the federal or state governments provides the PRP with a right to pursue contribution under Section 113(f)(3)(B). Pet. Brief, at 43 note 18. Importantly, not all voluntary cleanups are "unsupervised" as petitioner suggests, though they certainly require fewer resources of the federal and state government than formal administrative or judicial enforcement actions.[2] Additionally, the

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[2] Petitioner's contention that voluntary cleanups are "unsupervised" implies that such cleanups are performed incorrectly. However, as petitioner fails to recognize, any

petitioner does not address whether voluntary cleanup agreements with state environmental agencies would also provide PRPs with a right of action under CERCLA even though they are not enforcement actions per se. Although it is the City's position that all cleanups, supervised or unsupervised, should give rise to a private cost recovery claim, it is especially important for this Court to recognize that PRPs who perform cleanups pursuant to a voluntary cleanup agreement with a state environmental agency have a private right of action to pursue their response costs under either 107(a)(4)(B) or 113(f)(3)(B). Petitioner's proposal does neither and forces a would-be volunteer to wait and be sued by the United States or a state, before it has any chance of recovery.

If the Court does not make the distinction between supervised and unsupervised voluntary cleanups, PRPs who conduct thorough, government-approved cleanups may lose their right to recover some of their cleanup costs. Indeed, as a result of *Cooper Industries*, several courts have disallowed contributions actions because the PRPs conducted their cleanups pursuant to state approved voluntary agreements rather than former administrative consent decrees or enforcement actions. See, e.g., *Consolidated Edison of New York*, 423 F.3d at 96 and *Differential Development-1994, Ltd. v. Harkrider Distrib.*

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private party that hopes to bring a Section 107(a)(4)(B) claim to recover its costs must conform its cleanup to the rigorous procedures and protocols set forth the National Contingency Plan (NCP). See 40 C.F.R. Part 300 *et seq.* Those who do not are denied recovery under CERCLA. See e.g., *Carson Harbor Village, LTD v. County of Los Angeles, et al.*, 433 F.3d 1260 (9th Cir. 2006). Thus, all private cost recovery actions must meet objective standards promulgated by EPA in order to be successful.

Co., Case No. H-05-3375, 2007 U.S. Dist. LEXIS 1592, *27 -*41 (D. Tex. 2007). A holding that bars PRPs who enter into voluntary cleanup agreements from recovering their response costs would not only be inequitable, but it would effectively eviscerate the gains made by the national shift toward voluntary cleanup programs over "command and control" cleanups. Thus, this Court should recognize this distinction to avoid such a result.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully urges the Court to affirm the decision of the Court of Appeals for the Eighth Circuit to avoid serious negative consequences for all persons who engage in the voluntary cleanup and remediation of hazardous contamination.

Respectfully submitted,

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